Office-Supreme Court U.S.
AUG 4 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

~~SEPTEMBER~~ OCTOBER TERM, 1966

No. 415

ARUNDEL SUPPLY CORPORATION,

Petitioner,

v.

ANNIE W. DOVELL, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM A. EHRMANTRAUT
JOHN J. MITCHELL
1625 K Street, N. W.
Washington, D. C.
Counsel for Petitioner

SUBJECT INDEX

Citations to Opinions Below 1
Jurisdiction 1
Question Presented 2
Statement of the Case 2
Reasons for Granting the Writ 5
Conclusion 11

TABLE OF CASES CITED

Henkelmann v. Metropolitan Life Insurance Company, 180 Md. 591, 26 A.2d 418 9

Hood v. Azrael, 167 Md. 641, 175 A. 666 . . . . . 5, 8, 9, 10

Keitz v. National Paving & Contracting Company, et al., 214 Md. 479, 134 A.2d 296 (1957) 5, 8, 9

Knight v. Handley Motor Company, 198 A.2d 747 8

Maryland Casualty Company v. Sause, 190 Md. 135, 57 A.2d 801 (1947) 5, 10

Washington News Company v. Satti, 169 Md. 489, 182 A. 286 9

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1966

No.

ARUNDEL SUPPLY CORPORATION,

Petitioner,

v.

ANNIE W. DOVELL, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals (R. 63-71) for the District of Columbia Circuit is reported in ___ F.2d ___.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 6, 1966. (R. 72) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 and Rule 19 (1) (b), Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Did the United States Court of Appeals for the District of Columbia Circuit render a decision in conflict with the decisions of the Maryland Court of Appeals, which has decided on similar facts that a relationship of independent contractor existed?

STATEMENT OF THE CASE

The defendant, Skouzes, at the time of the happening of the accident was in the general hauling business and had been engaged in that occupation since 1960. (R. 53) He had his own place of business at 1527 61st Avenue, Hillside, Maryland. (R. 53) At his place of business he had garage facilities and received his mail. (R. 53) Skouzes always returned his trucks to his place of business and never left them parked at Arundel overnight. (R. 57) In the event he obtained a hauling job he would leave his place of business at the above address and in fact on the day of the accident did so. (R. 54) His calls for hauling jobs were generally received at his home and he would leave from his home to his business location and from there to where the haul would commence. During the entire time period that Skouzes hauled for Arundel he never received a call at Arundel for a job. (R. 57) This was the routine followed on the day of the occurrence. (R. 54) During the time he was in the hauling business he not only hauled for Arundel Supply Corporation but also for others such as John Glen Incorporated; Regal Construction Corporation; American Concrete Corporation; Washington Sand and Gravel, and many others (JA 34). The compensation arrangements with the other contractors was similar to that with Arundel although occasionally he had a different arrangement. (R. 54) Skouzes had two trucks at the time of the occurrence and was being compensated by Arundel according to tonnage hauled. (R. 55) He operated one of the trucks and his driver operated the other and they were paid sixty cents (60¢) a ton. (R.

55) The driver of the other truck was Robert Dixon and Skouzes maintained workmen's compensation insurance on him. (R. 60) Skouzes also maintained payroll records on his other driver, and Arundel had nothing to do with this employment (R. 60). The maintenance of the two trucks and their repair was Skouzes' responsibility as the owner of same. (R. 59) Arundel never repaired the trucks. (R. 58) Arundel never furnished any equipment to Skouzes only providing the load for hauling (R. 59). No inspection was made by Arundel of the mechanical operation of the truck (R. 58). Before being permitted to haul for Arundel Skouzes was required to present a certificate of Insurance (JA 43), and this certificate had to be presented each year to Arundel on its renewal (JA 43). No representation was made by Arundel to Skouzes that they also carried insurance on his vehicles. (R. 58) Skouzes had no signs on his trucks indicating he was hauling for Arundel (R. 55).

Skouzes' financial arrangements with Arundel was a verbal agreement that he was to be paid Sixty Cents (60¢) a ton for hauling (R. 55). Either party could terminate the relationship at will (JA 35, 45). The only person Skouzes ever dealt with in entering into the agreement to haul was the scale man for Arundel and he had never made any agreement with any officer of that company (JA 39). He was not under an obligation to haul for Arundel except to maintain a good business relationship (JA 27). Skouzes was paid by the tonnage according to distance and on the particular haul involved received the stated Sixty Cents (60¢) per ton. (JA 37) When the load was delivered to the receiver, the receiver signed a receipt which was turned into the bookkeeper for Arundel and Skouzes was paid each week for the tonnage-distance hauls of the previous week by his trucks. (JA 37) Nothing was deducted by Arundel from the moneys due Skouzes on these tickets (R. 55).

On the day of the occurrence Skouzes was operating one truck and his employee operating his second truck (both owned by Skouzes) and both were hauling for Arun-

del (R. 55-56). The haul was from Arundel Supply Corporation in Maryland to Maine Avenue in the District of Columbia for the Corson and Gruman Corporation. (JA 31) It was up to the hauler to pick the route to the destination and they generally picked the shortest way to make better time. (R. 56) The truck in question operated by Skouzes was loaded with bank gravel which deducting the weight of the truck came to 17.75 tons, the truck having a 20 ton capacity. (JA 42) Arundel did not require Skouzes to take any particular amount of tonnage, that being up to him but if the order was for 20 tons and Skouzes would only take 10 tons then Arundel would send two trucks (JA 41). Skouzes' recollection is that his other truck was hauling gravel to another contractor (JA 36). On the day of the occurrence Corson and Gruman needed 5, 6, or 7 trucks one of which was Skouzes'. (R. 57-58) Skouzes went to the gravel pit to obtain the stated load. The amount of the load is sometimes determined by Arundel and sometimes by the hauler although generally Arundel designated it since the requirements of the job would dictate it. (JA 41) However, if the truck was overloaded the hauler would have the right to dump as much as he wanted (JA 42). The load would then be weighed at the scale and the "scale man" would advise the hauler the address where the load was to be taken. (JA 44) The "scale man" did not tell the hauler which route to follow. (JA 44) It was also up to the hauler to pick the shortest route (JA 36). Arundel only designated the destination but did not control the manner of delivery this being entirely up to Skouzes. (JA 44) On arrival at the destination no one from Arundel would be there. (R. 55) The particular load that was being carried at the time of the accident was to be delivered before 5:00 o'clock because the employees of Corson and Gruman quit working at that time. (R. 60-61) On this particular job, because of its size when Skouzes arrived at the job site (having carried several previous loads to it that day) the employees of Corson and Gruman would tell him where to dump it. (R. 58)

The Court below reversed the judgment of the District Court granting summary judgment in favor of Arundel Supply Corporation basing its opinion primarily on the decisions of the Maryland Court of Appeals citing in support *Keitz v. National Paving and Contracting Co.*, 214 Md. 479, 491, 134 A.2d 296, 301, and *Maryland Casualty Co. v. Sause*, 190 Md. 135, 57 A.2d 801. Of the three judge court two voted in favor of reversal and the third member dissented and voted for affirmance of the District Court.

REASONS FOR GRANTING THE WRIT

It is the contention of petitioner that the United States Court of Appeals for the District of Columbia Circuit having determined that the law of the District of Columbia and the State of Maryland are similar in determining independent contractor relationship improperly interpreted the law as stated by the Maryland Court of Appeals.

The case of *Hood v. Azrael*, 167 Md. 641, 175 A. 666, is identical factually to the case at bar.

The facts in "Hood" were that the defendant was in the business of selling coal at retail. When a customer gave an order for coal a trucker or hauler delivered the coal to the customer. The suit arose from an auto accident occurring when the hauling truck was involved in a collision with an automobile in which the plaintiff was a guest. The question that the Maryland Court of Appeals was concerned with was whether the operator of the truck was the servant of the defendant or an independent contractor. The operator of the coal truck kept the truck on his own premises, maintained it in repair, and in operating condition; bought all oil, gasoline, and supplies at his expense; and had sole possession and control of its use. As the Maryland Court of Appeals set forth the facts in the quote below, they present a weaker picture than is presented by the facts herein. In "Hood" it is stated:

"* * * the defendant was, almost exclusively, his patron, although neither was bound by contract beyond each job of hauling. The defendant, when he had coal to be delivered at the time of the truckman's call at the coal yard, gave the bailee an order for coal that bore the name of the defendant as the seller, the kind, quantity, and price of the coal ordered, and generally the name and address of the customer, and usually instructions not to deliver the coal until the amount due had been paid. The truckman would receive the written order for the coal, and drive the truck to the right bin, where he and his helper would fill the sacks with the quantity and kind of coal purchased; and put the sacks on the truck. Thus loaded, the truck was then driven off in charge of the truckman to the residence of the purchaser, where the truckman would first collect the amount shown to be payable, and then leave the coal, and return to the coal yard to give the money collected to the defendant. If the buyer did not pay, the coal would be returned to the yard. The sacks in which the coal was delivered were furnished by the defendant, and were commonly left on the truck. For the services so rendered, the truckman was paid weekly for the tonnage of coal hauled during that period at the rate of ninety cents a ton, unless the coal was hauled beyond the limits of the city, when an increased compensation was paid.

As in this case the Court had to decide the simple question that is whether the driver of the truck was a servant of the defendant or an independent contractor. The Marylant Court reviewed certain authorities and the facts and stated:

"The contractor, on the record at bar, was engaged in the occupation of hauling for hire whatever was offered within the capacity of a motor truck of which he was the bailee. The defendant was his principal, although not wholly exclusive, hirer, but this circumstance does not affect the independent nature of his business. Every job of hauling was a separate transaction, whose unity was not changed by the circumstance that settlements were on a weekly basis. So far as the defendant is concerned, every hiring began with the delivery by the defendant to the truckman of

an order for coal that was to be delivered to the customer in large canvas sacks which the defendant supplied. From that point, the employment of the truckman was independent of his hirer, and the truck, its possession, control, use, up-keep, and repairs were in the truckman, who, with his own selected servants, filled the sacks with coal, loaded them on the truck, and hauled them to their destination along whatever route and in such time as he might choose, and all the while operated according to his own judgment and discretion, and with such assistants as he might see fit to use in the performance of the contract of carriage. The method of collecting the price of the coal from the customer, and of the payment of the money to the hirer, or, in the event the customer failed to pay, the return of the sacks of coal to the dealer, were left in the control of the truckman. Consequently, from the terms of the contract, the service to be rendered by the truckman was in an independent employment, wherein he was free to exercise his own judgment and discretion as to the means and servants he would use in the performance of an undertaking which was not within the control of the hirer. So long as the truckman got the coal for delivery, and returned either the money received from the customer or, in case the buyer did not pay, the coal, his contract was finally performed, no matter the intervening means adopted. In the period comprised between the beginning and the end of performance of the contract the truckman was not subject to the command of the dealer in respect of the manner in which he would perform the contract. Since the power of controlling the manner of the doing of the service agreed was in the truckman, and not in the hirer, the latter was not liable for the negligence of the former in the course of the performance of the contract, and it was error for the nisi prius court to refuse the prayer of the defendant that instructed the jury to find for the defendant."

The similarity to the facts and the relationship created by those facts cannot be disputed. The defendant Skouzes was in the general hauling business not only for appellee but also for many others under similar arrangements for compensation. He had and maintained his own place of

business, left and always returned to his place of business before and after a job; and had two trucks in his business one which he drove, and the other which was driven by his driver who he hired and maintained Workmen's Compensation and payroll records; Skouzes further paid all operating costs of the truck; maintained them in operating condition; and maintained insurance on them which certificate of insurance he in fact had to furnish to Arundel before he could have a hauling job. Skouzes' compensation was according to tonnage hauled and distance involved. The particular haul when the accident occurred was from Arundel's gravel pit in Maryland to a point in the District of Columbia. It was up to Skouzes to pick his route and as he testified he generally picked the shortest way in order to make better time. This seems logical since the more hauls he could make the more compensation he would realize. Arundel did not require Skouzes to take any particular tonnage but of course the less he carried on a haul the less compensation he received. The only acts of Arundel were to place the gravel in the truck and tell the destination. The manner and route to the destination was up to Skouzes. On arrival at the delivery point no one from Arundel was present and in fact the receiver designated where the load was to be dropped. There was absolutely no control exercised over Skouzes or his driver and he was free to exercise his own discretion in accepting a haul, the amount of the haul, the manner and method of delivery and the hiring and firing of drivers or servicing personnel.

It is clear that under the facts in *Hood v. Azrael,* supra, and *Knight v. Handley Motor Company,* 198 A.2d 747 (using Maryland law) that the relationship between Skouzes and Arundel was one of law for the Court and not one of fact for the jury.

The case of *Keitz v. National Paving & Contracting Co., et al.,* 214 Md. 479, 134 A.2d 296 (1957) strongly relied on by the U. S. Court of Appeals for the District

of Columbia affirms *Hood v. Azrael*, supra. It should be noted in *Keitz v. National Paving & Contracting Co., et al.*, supra, the following facts existed under the evidence as distinguished from *Hood v. Azrael*, supra, and the case at bar. The supplier of the trucks in question not only furnished trucks and drivers but also men to do various other types of work such as a shovel or roller operator or to fill in for absent employees. Repairs to vehicles of the asphalt company were made by the alleged hauling contractors (supplier) and they also went out on call if the company's vehicles broke down and also supplied parts ordering them on the company's account. While the trucks of the hauling contractor were being used by the company they were required to have metal signs affixed bearing the company's name and emblem. An annual agreement was entered into between these parties whereby the hauling contractor agreed to be responsible for furnighing the additional trucks needed daily by the company and tonnage prices were set for the year for hauls into the company's plants. The company did not have a truck for a particular job but by the day. Compensation was given to the hauling contractor by the hour and by the ton payable at the end of the month in full but a substantial amount given on account. The drivers for the hauling contractor were told when and where to report at the company but once there anyone of authority could tell them what to do. There was in fact a definite agreement that the hauling contractor's drivers had to take and okay whatever orders or instructions were given by the company's supervisory personnel.

The Court of Appeals of Maryland and certainly this Court should have no difficulty distinguishing the facts existing in *Keitz* from the facts in *Hood* and in the case at bar. As the Maryland Court stated in *Keitz v. National Paving & Contracting Co., et al.*, supra:

> "The essential elements of choice present in the cases of Hood v. Azrael, 167 Md. 641, 175 A. 666; Washington News Company v. Satti, 169 Md. 489, 182 A. 286; and Henkelmann v. Metropolitan Life

> Insurance Co., 180 Md. 591, 26 A.2d 418, are not present here. In the case at bar, it will be seen from the testimony quoted above, that the jury might have concluded, that National and its superintendents had an almost unlimited right to control and direct Ogle in the performance of National's work, once he had reported to National . . . Ogle stated that 'Whatever National's superintendent told (him) to do, (he) would do.' This clearly seems to have permitted National a wide latitude in controlling and directing his work, such as is anticipated in the relationship of master and servant."

There is no evidence in the record which could support in any way the conclusion that Skouzes was under the direction and control of supervisory personnel of Arundel. On the contrary the record clearly indicates that he was free to act at his will both in doing a hauling job for the appellee and in the manner of performance.

The United States Court of Appeals of the District of Columbia Circuit also has relied on *Maryland Casualty Company v. Sause*, 190 Md. 135. The facts of that case show a hiring of the truck operator, exercise of control over the manner and method of delivery, including unloading, and compensation payable. The Court of Appeals found that "Sause" alone paid the truck operator, alone could hire or discharge him, and alone had the contract under which the truck operator was performing. The facts therein show control by "Sause" in the performance and operation by the truck operator while the record herein is barren of any evidence to show control by Arundel of the Skouzes operations. It should be also noted in both decisions the Maryland Court of Appeals upheld its finding in *Hood v. Azrael*, supra, but distinguished it on the facts.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM A. EHRMANTRAUT
JOHN J. MITCHELL
1625 K Street, N. W.
Washington, D. C.
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for writ of certiorari was personally served upon Leonard Lipshultz at 635 F Street, N.W., Washington, D.C. this 4th day of August, 1966.

William Ehrmantraut

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,392

ANNIE W. DOVELL, et al.
Appellants

vs. Civil 15-63

ARUNDEL SUPPLY CORPORATION
Appellee

Appeal From the United States District Court
for the District of Columbia
(Before Bazelon, Chief Judge, Edgerton, Senior
Circuit Judge, and Fahy Circuit Judge)

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be and it is thereby reversed, and that this cause be, and it is hereby, remanded to the District Court for further proceedings not inconsistent with the opinion of the Court.

It is further Ordered by this Court that appellants herein recover from appellee their taxable costs on this appeal, and have execution therefor.

Per Circuit Judge Fahy

Dated: May 6, 1966

Separate dissenting opinion by Senior Circuit Judge Edgerton.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19392

ANNIE W. DOVELL, *et al.*, APPELLANTS

v.

ARUNDEL SUPPLY CORPORATION, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

Decided May 6, 1966

Mr. Peter S. Taylor, with whom *Messrs. Sol Friedman, Leonard L. Lipshultz, Samuel Green*, and *Hyman L. Rosenberg* were on the brief, for appellants.

Mr. Edward C. Donahue, with whom *Mr. John J. Mitchell* was on the brief, for appellee.

Before BAZELON, *Chief Judge*, EDGERTON, *Senior Circuit Judge*, and FAHY, *Circuit Judge*.

FAHY, *Circuit Judge:* The appellants, Annie W. Dovell and her husband Raymond, sued John Skouzes and Arundel Supply Corporation for damages arising from an injury allegedly suffered by the wife when she was struck by a truck while crossing a street. Skouzes was the driver-

owner of the truck. Arundel was alleged to be his master and, therefore, could be held responsible under the doctrine of *respondeat superior*. Arundel moved for summary judgment under Rule 56(c), Fed. R. Civ. P., urging that the data before the court on the motion demonstrated that Skouzes as a matter of law was an independent contractor. The motion was granted and the complaint dismissed as to Arundel, followed by this appeal. We think there was an issue of fact as to the disputed relationship between Arundel and Skouzes which precluded summary judgment.

The facts relied upon by the court may be stated as follows: John Skouzes owned two large dump trucks. He drove one. He hired a driver for the other. Skouzes kept the trucks at a garage he rented and was responsible for their maintenance. From 1960, the year he obtained the trucks, until this accident in November 1962, he worked for Arundel, who had a daily right of first refusal of Skouzes' services. He was free to seek other work only if Arundel told him he would not be needed that day. This understanding was necessary to Skouzes' employment with Arundel. The contract of employment was oral and could be terminated by either party without notice. A deposition indicates that Skouzes' work for Arundel was quite regular, varying between a five and six-day week. Arundel would load the truck with gravel and measure the load. A representative of Arundel would designate its recipient and leave the choice of route up to the driver unless he asked directions. Efficient service was achieved through requiring a certain number of deliveries to a particular location in a day. To prove delivery and the amount delivered a receipt would be obtained at destination. Arundel paid Skouzes weekly on a ton-mile basis without any deductions. It was on such a delivery run in the late afternoon of November 16, 1962, that the accident occurred.

Skouzes carried liability insurance and also Workmens Compensation insurance on the driver of his second truck.

A question is raised whether the law of Maryland or of the District of Columbia should be applied. The injured party is a resident of the District and the alleged tort occurred here. The driver of the truck is also a District resident but garages his trucks in Maryland. Arundel is a Maryland Corporation.

The rule in the District of Columbia is that where a conflict of law as to a particular issue exists the law of the jurisdiction with the more substantial interest in the resolution of the issue is applied. *Tramontana* v. *S. A. Empresa De Viacao Aerea Rio Grandense,* —— U.S. App. D.C. ——, 350 F.2d 468, *cert. denied,* —— U.S. ——; *Williams* v. *Rawlings Truck Line,* —— U.S. App. D.C. ——, —— F.2d ——. But there is no conflict of law between Maryland and the District on the question presented. As we understand the cases the Maryland courts would leave to the jury on the facts above outlined the question whether Skouzes was an independent contractor or an employee of Arundel. The District of Columbia, taking guidance from opinions of the Supreme Court on the same question in other fields, and adhering as we understand to the better view, would also leave the question to the finder of fact. Since the law in Maryland and the District is not in conflict the problem of conflict disappears.

In Maryland the law looks to five factors at least in the determination of the relationship of master and servant:

> These are: (1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer. Standing alone, none of these *indicia,* excepting (4), seem controlling in the determination as to whether such relationship exists. The decisive test in determining whether the relation of master and servant exists is whether employer has the *right to control and direct the servant in the per-*

> *formance of his work and in the manner in which the work is to be done.* It will be noted from the above, it is not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is his *right* to do so that is important. (Citations omitted.)

Keitz v. *National Paving and Contracting Co.*, 214 Md. 479, 491, 134 A.2d 296, 301; also see *Maryland Casualty Co.* v. *Sause*, 190 Md. 135, 57 A.2d 801. In *Keitz* evidence was introduced to show that the truck was an integral and necessary part of the alleged master's business and subject to the same direction and control as his own trucks. The court held "there was legally sufficient evidence to require the submission [of the question] to the jury. . . ." *Keitz* v. *National Paving and Contracting Co.*, *supra* at 493, 134 A.2d at 302. The case on its facts is as close to our own as the case principally relied on by appellee, *Hood* v. *Azrael*, 167 Md. 641, 175 A. 666. The Maryland Court of Appeals has distinguished *Hood* in both the *Sause* and *Keitz* cases.

Our own case of *Grace* v. *Magruder*, 80 U.S. App. D.C. 53, 148 F.2d 679, gives some support to the view that a factual issue is presented. The opinion discussed *inter alia* whether "coal hustlers" who stored coal at the place of a coal customer after its delivery there by the company were independent contractors or company employees. The term "employee" was first considered in the context of the Social Security Act, there involved, and then under common law standards. The hustlers were held not to be independent contractors:

> The vital element which negatives such independence, in the relation between employer and employee, is the right to control the employee, not only as to the final result, but in the performance of the task itself. And, it is the right to control, not control or supervision itself, which is most important. (Footnote omitted.)

80 U.S. App. D.C. at 55, 148 F.2d at 681.

The court referred to *Yellow Cab Co.* v. *Magruder*, 49 F. Supp. 605, 607, where our District Court stated:

> Probably the most important of these tests is whether the alleged master in any case has the right, even if he does not exercise it, to control and direct the alleged servant, not only as to *what* shall be done but *how* it shall be done. Each case depends upon its own facts and circumstances, and in doubtful cases it is necessary to examine the particular facts to answer the question.

The *Grace* case does not control the present one, for there are significant differences in the facts; but it is worthy of note. The court also stated:

> This storage of coal is an essential, integral part of appellant's business; a customary service of retail coal dealers. Nothing could be more destructive of the good will and other intangibles upon which the success of such a business depends than improper service at the point of contact between the company and the customer. (Footnote omitted.)

80 U.S. App. D.C. at 56, 148 F.2d at 682.

These observations, though perhaps to a somewhat less degree, are pertinent to our case. Skouzes was not brought in as a plumber, for example, to perform a function unrelated to Arundel's supply business as such. His function was directly related to and essential to the supplying of gravel by Arundel to Arundel's customers.

It is suggested that *United States* v. *Silk*, 331 U.S. 704, stands in the way of the appeal. Though not a tort action but one involving responsibility for Social Security taxes, the facts regarding the relationship of the parties have much in common with those now before us. The case arose by action of the company to recover taxes levied against it as the employer of men the company claimed were independent contractors. The company contracted with truck-owners to deliver coal to its customers at a uniform price per ton, and paid the truckers out of the price received from the customer.

The court detailed further facts bearing upon the relationship of the parties. It said the terms "employment" and "employee" were to be construed to accomplish the purposes of the Social Security legislation, and held the truckers were not employees but independent contractors. In such an action against the United States for recovery of taxes paid, the judge decides questions of fact as well as of law. The case does not persuade us that had a jury decided otherwise, the Court would have set the verdict aside. Moreover, in *Silk* the Court reached its decision in light of the purposes of the Social Security Act rather than solely under the common law test which governs our case.

In *Baker* v. *Texas & Pacific Ry. Co.*, 359 U.S. 227, 228, the Court said:

> Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury.

Baker arose under the Federal Employers' Liability Act, but the statutory terms "employee" and "employed" were held not to be used in any special sense; and so the question whether the injured person was within the protection of the Act as an employee of the railroad company was to be decided as a matter of "federal law under the Act." In so deciding the Court cited as relevant Restatement, Agency 2d § 220, comment *c.* which reads:

> *c. Generality of definition.* . . . The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation. See Comment *g.* If the inference is clear that there is, or is not, a master and servant relation, it is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered.

The factors stated in Subsection (2) are:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer of the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Some of these factors argue in favor of the decision on appeal, others that Skouzes was an employee of Arundel. The inference one way or the other is not so clear that reasonable men could reach but one conclusion.

After *Silk* and *Baker* came *Ward* v. *Atlantic Coast Line R. Co.*, 362 U.S. 396, also under the Federal Employers' Liability Act, where the Court reaffirmed its deference to the jury on the existence of an employee relationship to be decided "on the basis of all the relevant factors." *Id.* at 400.

True it is that in *Ward* the Court was considering the problem under the Federal Employers' Liability Act, as in *Silk* its consideration was in light of the purposes of the Social Security Act, while our case is free of either of these considerations. But the fundamental problem

of relationship is sufficiently the same that those cases convince us that a jury determination is required here, since this is a doubtful case even though a close one.

Reversed and remanded for further proceedings not inconsistent with this opinion.

EDGERTON, *Senior Circuit Judge, dissenting:* Skouzes was in the business of hauling. He kept his trucks in repair and carried liability insurance, and also Workmen's Compensation Insurance on the driver of his second truck. Though he hauled chiefly for appellee and was doing so when the accident occurred, he also hauled for others.

It appears to me that reasonable jurors "could not reach differing conclusions" on the question whether Skouzes was an employee of Arundel or an independent contractor. Though the question in *Silk* was whether workers were employees within the meaning of the Social Security Act, the Supreme Court's opinion expressly dealt with tort liability as well. After holding that "unloaders" who furnished only picks and shovels were employees,[1] the Court said: "There are cases, too, where driver-owners of trucks or wagons have been held employees in accident suits at tort or under workmen's compensation laws. But we agree with the decisions below . . . that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they *must*[2] be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul

[1] "Cf. *Grace* v. *Magruder*, [U.S.App.D.C.] 148 F.2d 679." 331 U.S. at 717 n.12.

[2] Emphasis added.

for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors." *United States* v. *Silk*, 331 U.S. 704, 718-719 (1947).

"A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." RESTATEMENT, AGENCY 2d, § 220(1) (1958). In *Ward* v. *Atlantic Coast Line R. Co.*, 362 U.S. 396, 398 n.1 (1960), the Supreme Court held that a District Court erred in refusing to instruct a jury that the "primary factor to be considered" in determining whether a man was employed by the railroad within the meaning of the Federal Employers' Liability Act was " 'whether or not the railroad had the power to direct, control, and supervise [him] in the performance of his work . . .' " The Act "does not use . . . 'employed' in any special sense . . ." *Baker* v. *Texas & P. Ry. Co.*, 359 U.S. 227, 228 (1959).

I would affirm.